IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 18, 2007

RICHARD C. ANDERSON v. HOWARD CARLTON, WARDEN

Direct Appeal from the Criminal Court for Johnson County
No. 5081 Lynn W. Brown, Judge

No. E2007-01465-CCA-R3-HC - Filed January 11, 2008

The petitioner, Richard C. Anderson, appeals the criminal court's order summarily dismissing his pro se petition for writ of habeas corpus. Following our review of the record and applicable law, we affirm the court's order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Richard C. Anderson, Pro Se, Mountain City, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner's judgment of conviction reflects that in 2006 he pled guilty to possession of a schedule II controlled substance with the intent to sell, a Class C felony. He received a sentence of five years incarceration in the Tennessee Department of Correction. On January 11, 2007, the petitioner filed a pro se petition for habeas corpus relief, alleging that his sentence was illegal because it was enhanced beyond the presumptive minimum sentence of three years in violation of *Blakely v. Washington*, 542 U.S. 296 (2004) and *Cunningham v. California*, 127 S.Ct. 856 (2007). The criminal court summarily dismissed the petition, finding that the petitioner's allegation, even if true, did not support a finding that his conviction was void or his sentence expired. The petitioner now appeals.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated sections 29-21-101 through 29-21-130 codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus

is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *See Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007); *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. *See Taylor*, 995 S.W.2d at 83. The burden is on the petitioner to establish by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. *See Summers*, 212 S.W.3d at 260; *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

In his appellate brief, petitioner re-asserts that he is entitled to habeas relief because his sentence was enhanced by the judge, rather than a jury, in violation of his Sixth Amendment rights as set forth in *Blakely v. Washington*. The petitioner relies on *Cunningham* because the case applies the rule in *Blakely* that facts relied upon to enhance a defendant's sentence (other than prior convictions) must be found by a jury and not a judge. *See Cunningham*, 127 S.Ct. at 865. The petitioner also complains that the criminal court erred in not ruling upon his request to proceed as an indigent person and taxing the costs of the proceeding to his account.

Upon review, we note that this court has held that *Blakely* violations do not apply retroactively to cases on collateral appeal. *See, e.g., Billy Merle Meeks v. Ricky J. Bell, Warden*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486 (Tenn. Crim. App., at Nashville, Nov. 13, 2007); *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594 (Tenn. Crim. App., at Nashville, May 1, 2007); *James R.W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied* (Tenn. Oct. 10, 2005). We also note that the decisions of *Blakely* and *Cunningham* relate to constitutional violations which, even if proven true, would merely render the judgment voidable and not void. *See, e.g., Meeks*, 2007 WL 4116486; *Bowles*, 2007 WL 1266594; *Donovan Davis v. State*, No. M2007-00409-CCA-R3-HC, 2007 WL 2350093, (Tenn. Crim. App., at Nashville, Aug. 15, 2007), *perm. app. denied* (Tenn. Nov. 13, 2007). We further note that nothing on the face of the petitioner's judgment indicates that the convicting court was without jurisdiction to sentence the petitioner or that the sentence has expired. As a result, the court's summary dismissal was proper. *See Summers*, 212 S.W.3d at 260.

As to the petitioner's complaint regarding his indigency status, we note that while the petitioner filed the Pauper's Oath and Uniform Civil Affidavit of Indigency, he failed to include a certified copy of his inmate trust fund account or any other proof to support his indigency status. *See* Tenn. Code Ann. § 41-21-805. Additionally, we note that our Tennessee statutes allow for the

commencement of a civil action, including the filing of a petition for writ of habeas corpus, without giving security for the costs and without paying litigation taxes when the petitioner files an oath of poverty and affidavit of indigency. Tenn. Code Ann. § 20-12-127. However, our statutes specifically state that "[t]he filing of a civil action without paying the costs or taxes or giving security for the costs or taxes does not relieve the person filing the action from responsibility for the costs or taxes but suspends their collection until taxed by the court." *Id*. Therefore, "[e]ven if the petitioner had filed the necessary documentation to proceed without securing the costs, he would not be exempt from the payment of costs in the trial court on this basis alone." *Kelvin Wade Cloyd v. Howard Carlton, Warden*, No. E2004-02003-CCA-R3-HC, 2005 WL 562755, *2 (Tenn. Crim. App., at Knoxville, March 10, 2005). As noted by our supreme court:

> [N]either the plain language of [Supreme Court Rule 29], nor the plain language of Tennessee Code Annotated section 20-12-127(a) (Supp.1999), contemplates that indigent litigants are permanently relieved from their responsibility to pay litigation taxes. Rather, Rule 29 and section 20-12-127(a) only contemplate that an indigent litigant will not be denied access to the courts to commence a civil action solely because of an inability to pay litigation taxes.

Fletcher v. State, 9 S.W.3d 103, 105 (Tenn. 1999); *see also Cloyd*, 2005 WL 562755.

The authority to tax the costs of habeas corpus litigation to the petitioner is within the discretion of the trial court. *See* Tenn. Code Ann. § 29-21-125. As indicated, the petition for writ of habeas corpus failed to allege a cognizable claim for habeas corpus relief. Therefore, in our view, the court did not abuse its discretion by failing to find the petitioner indigent and taxing the costs to his account.

In sum, the allegations set forth in the petition do not demonstrate that the petitioner is entitled to habeas corpus relief. Accordingly, the criminal court did not err by summarily dismissing the petitioner's habeas corpus petition and taxing the costs to the petitioner.

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J.C. McLIN, JUDGE